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February 8, 2002

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

William F. Caton, Acting Secretary  
Federal Communications Commission  
The Portals  
445-12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: **Ex Parte Presentation**  
*Definition of Radio Markets*, MM Docket No. 00-244

Dear Mr. Caton:

Enclosed please find a copy of a Petition to Deny that was filed by Jarad Broadcasting of Westhampton, Inc. ("Jarad") with respect to a pending assignment application for WCSO(FM) and which includes arguments that Jarad would like to have considered in the above-referenced docket. More specifically, the Petition to Deny explains why the contour overlap methodology is inappropriate in determining the radio market where the contour overlap reflects the unique conductivity of radio signals over water. Consideration of contour overlaps over water for purposes of determining compliance with the multiple ownership rules is also inconsistent with established Commission policy in other areas involving contour overlaps which occur over or are generated by water.

As requested in the Commission's *Notice of Proposed Rulemaking*, a diskette including this letter and the Petition to Deny is being forwarded under separate cover to Wanda Hardy.

Sincerely,  
DICKSTEIN SHAPIRO MORIN  
& OSHINSKY LLP  
Attorneys for Jarad Broadcasting  
Company of Westhampton, Inc.

By: 

Lewis J. Paper

cc: James P. Riley  
Peter Tannenwald  
Ronald J. Morey  
John Caracciolo

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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JAN 28 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Application of: )

Peconic Bay Broadcasting Corporation )  
(Assignor) )

and )

AAA Entertainment Licensing, LLC )  
(Assignee) )

For Assignment of Construction Permit for )  
WCSO(FM), Southampton, New York )

File No. BAPH-20011207AAK

To: The Commission

**PETITION TO DENY**

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January 28, 2002

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In re Application of:	)	
	)	
Peconic Bay Broadcasting Corporation	)	
(Assignor)	)	
	)	
and	)	File No. BAPH-20011207AAK
	)	
AAA Entertainment Licensing, LLC	)	
(Assignee)	)	
	)	
For Assignment of Construction Permit for	)	
WCSO(FM), Southampton, New York	)	
To:     The Commission		

**PETITION TO DENY**

Jarad Broadcasting Company of Westhampton, Inc. ("Jarad"), acting pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. §309(d)(1), and Section 73.3584(a) of the Commission's rules, 47 C.F.R. §73.3584(a), hereby petitions to deny the above-referenced application (the "Application") proposing to assign the construction permit (the "CP") for Station WCSO(FM), Southampton, New York ("WCSO" or the "Station"), from Peconic Bay Broadcasting Corporation ("PBBC") to AAA Entertainment Licensing LLC ("AAA").

**Introduction and Summary**

The Application raises a novel issue never previously addressed by the Commission: whether the contour overlap methodology incorporated within Section 73.3555(a) of the Commission's rules, 47 C.F.R. §73.3555(a), can include contour overlaps created solely by the unique conductivity of a radio signal over seawater if, as is the case here, the signal emanates

from a distant station in a different state which is separated from the relevant radio market by a large body of seawater. The WCSO Application demonstrates why that question should be answered in the negative.<sup>1</sup>

AAA's proposed acquisition of the CP would result in AAA's ownership of four (4) FM radio stations in the "market" as defined under the Commission's multiple ownership rules. The Application asserts that AAA's ownership of four (4) FM radio stations is consistent with the multiple ownership rules because there are allegedly twenty (20) radio stations in the relevant market (the "Market"). However, seven (7) of those twenty radio stations are located in different states (Connecticut, Massachusetts and Rhode Island) which are separated from Long Island, New York (the location of WCSO) by a large body of seawater (the Long Island Sound). In one of the cases (a radio station in Boston, Massachusetts), the Application has relied on incorrect coordinates which, if corrected, would show that there is no contour overlap whatsoever with any of the contours of the stations AAA owns and proposes to own in the WCSO Market in Eastern Long Island. In the other six (6) cases, the radio stations' signals extend over the Long Island Sound and then terminate upon reaching the north shore of Long Island. In no practical sense can it be said that those six other radio stations provide any service to the WCSO Market.

The Commission has already identified certain issues (such as undue concentration of radio advertising revenue) where mere compliance with the contour overlap methodology may not be sufficient to justify a grant of an assignment or transfer of control application. That same consideration of extrinsic factors warrants denial of the WCSO Application. Commission rules and a long line of Commission decisions make it clear that contour overlaps occurring entirely or almost entirely over seawater will not preclude the grant of two otherwise mutually exclusive

---

<sup>1</sup> Since the issue presented herein is a novel one, it cannot be acted by the Mass Media Bureau under delegated authority. See 47 C.F.R. § 0.283(a)(14) (ii).

applications. The same logic precludes consideration of those kind of contour overlaps in determining the number of stations in a radio market by using the contour overlap methodology specified in the multiple ownership rules. In both cases, there is no signal interference, programming, or economic activity that justifies the inclusion of such stations in the same market.

If the Commission's contour-over-seawater policy is followed in the application of the local radio ownership rules, there would only be thirteen (13) stations in the WCSO Market. In that event, AAA would not be allowed to own four (4) FM stations in the Market, and the Application would have to be denied. The denial is all the more warranted because one of the Long Island stations included in the WCSO Market has a construction permit to move its transmitter to a site that will eliminate the existing contour overlap with AAA's commonly-owned stations, thus reducing the number of stations in the Market to twelve (12).

Even if it were not denied, the processing of the Application should be deferred in accordance with paragraph 14 of the Commission's Notice of Proposed Rulemaking in MM Docket No. 00-244, *Definition of Radio Markets*, 15 FCC Rcd 25077, 25082 (2000). In that paragraph, the Commission stated that it would defer the processing of applications if a prospective owner's commonly-owned radio station was counted as one of the stations in the "market" but not counted as one of the stations owned by that party within the same "market." In the instant case, one of the radio stations in the WCSO Market is WMOS(FM), another FM radio station owned by AAA. Consequently, a grant of the Application would result in AAA owning five (5) FM radio stations in the Market – a combination that is allowed only in situations where the market has forty-five (45) radio stations. Since the WCSO Market has less than one half of that number of radio stations, processing of the Application should be deferred until the Commission concludes its rulemaking proceeding concerning the appropriate methodology to define a radio market.

## **I. Standing**

Jarad is the licensee of Station WDRE(FM), Westhampton, New York. The principal community contour of WDRE overlaps with the principal community contour of WCSO and, as reflected in the Application, is one of the stations in the WCSO Market as defined by Section 73.3555(a) of the Commission's rules. Jarad therefore has standing to file this petition. *E.g. FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

## **II. Background**

PCCB holds the CP for WCSO in Southampton, New York. Southampton is located in Eastern Long Island.

At some date prior to November 9, 2001, PBBC and AAA Entertainment LLC entered into a Time Brokerage Agreement (the "TBA") which (1) would enable AAA Entertainment LLC to provide programming to be broadcast on WCSO after its construction, and (2) provided AAA Entertainment LLC with a right to purchase the CP.<sup>2</sup> The Application reflects the exercise of that purchase right by AAA Entertainment LLC. The Application further explains that "the provision of programming by AAA Entertainment LLC as a time broker has not, and never will, occur." Application at 6. That statement is premised on the assumption that "the construction permit is being assigned prior to construction . . . ." *Id.*

That latter assumption is based on a Purchase Agreement which PBBC and AAA Entertainment LLC entered into on November 9, 2001 and which provides for the assignment of the CP from PBBC to AAA Entertainment LLC. Section 24 of the Purchase Agreement states

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<sup>2</sup> The Application states that the TBA "has been filed with the Commission." *See* Application, Exhibit 4. However, undersigned counsel has been unable to locate the TBA in the Commission's files. As explained in the declaration annexed hereto as Exhibit 1, the TBA was not included in PBBC's public inspection file in Southampton. Accordingly, it is requested that PBBC include a copy of the TBA with its response to this Petition.

that AAA Entertainment LLC “may” assign its rights to AAA, the proposed assignee in the Application. However, no such assignment is included with the documents attached to the Application.

The Application identifies the other attributable interests of AAA and AAA Entertainment LLC. Those other interests include four (4) other FM radio stations in Eastern Long Island: WMOS, Montauk, New York; WEHM, Easthampton, New York; WBAZ, Bridgehampton, New York; and WBEA, Southold, New York. The CP would thus represent the fifth FM station to be owned by AAA in Eastern Long Island.

The Application certifies that AAA’s acquisition of the CP is consistent with the Commission’s multiple ownership rules. According to a Multiple Ownership Compliance Study in Exhibit 15 of the Application, the five FM radio stations owned and to be owned by AAA fall into two (2) separate radio markets. One market – the WCSO Market – is formed by the overlap of the principal community contours of Stations WCSO, WBAZ, WBEA, and WEHM. The second market involves the overlapping contours of WMOS and WBEA. Exhibit #1 of Exhibit 15 to the Application shows that the principal community contour for WMOS is approximately 0.37 miles from the WCSO principal community contour and 4.2 miles from the common overlap areas creating the WCSO Market. See Engineering Statement annexed hereto as Exhibit 2 at 6.

Exhibit 15 states that there are twenty (20) radio stations in the WCSO Market. One of those twenty stations is WMOS, which is *not* counted as one of AAA's commonly-owned stations in the WCSO Market.

Seven (7) of the other twenty radio stations in the WCSO Market identified in the Application are located in Connecticut, Massachusetts, and Rhode Island. The inclusion of one of those stations – WMKI(AM), Boston, Massachusetts – is a mistake. As explained in the Engineering Statement annexed hereto as Exhibit 2, the Application utilized an incorrect latitude



designation in the Commission's database. If the correct coordinate is utilized, there is no overlap between the principal community contour of WMKI and any of the stations to be owned by AAA in the WCSO Market.

The six (6) other radio stations in Connecticut and Rhode Island have transmitters that are located between 24.8 miles and 49.5 miles from the proposed WCSO transmitter site. *See Exhibit 2 at 4.* As explained in the attached Engineering Statement, the overlap between the principal community contours of those six Connecticut and Rhode Island stations and the AAA stations is almost entirely over seawater (namely, the Long Island Sound). In each case, the overlap reflects the unique conductivity characteristics of seawater. When the signal of each of those six stations leaves Connecticut or Rhode Island, as the case may be, the signal shoots across the water until it hits the north shore of Long Island. At that point, the signal terminates. *See Exhibit 2, Figures 1-8.* As explained in the attached Engineering Statement, the termination of the signals for those six Connecticut and Rhode Island Stations reflects the rapid dissipation of the signal after it reaches the Long Island shore. *Id.* at 5.

The Application also includes Station WXXP(FM), as being in the WCSO Market. WXXP recently received a construction permit to relocate its transmitter. The principal community contour of WXXP's modified facility will not overlap with any of AAA's owned or to be owned stations in the market. *See Exhibit 2 at 6.* As further explained in the declaration annexed hereto as Exhibit 3, the licensee for WXXP (Jarad Broadcasting Company of Calverton, Inc.) anticipates completing construction of WXXP's modified facility by March 2002, which will eliminate another station from the WCSO Market.

### **III. Application Must be Denied or, in the Alternative, Deferred**

#### **A. Application Inconsistent with Commission Rules and Purpose**

##### **1. Purpose of Multiple Ownership Rules**

From their inception, the Commission's multiple ownership rules were designed to promote diversity of viewpoints and competition for advertising revenue. *See Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations and Local Markets*, FCC 01-329 (November 9, 2001) ("*Merger NPRM*") at ¶¶3-7. The Commission wanted to ensure that the public would have access to differing viewpoints in programming as well as the benefits that arise when stations owned by different parties have to compete for the same pool of advertising dollars.

Those same goals were evident when the Commission substantially relaxed the local (and national) ownership limits in 1992. *Revision of Radio Rules and Policies*, 7 FCC Rcd 2755, 2773-79 (1992). Then, as now, defining the appropriate radio markets was critical to achieving the Commission's goals. Initially, the Commission proposed to use the markets established by Arbitron. In considering subsequent reconsideration petitions, the Commission became concerned that there would be many situations where the Arbitron markets would not provide a realistic portrait of the particular radio marketplace. The Commission therefore abandoned the Arbitron delineation of markets and opted instead for the contour overlap methodology that is currently found in Commission rules. *Revision of Radio Rules and Policies*, 7 FCC Rcd 6387, 6395-96 (1992). *See* 47 C.F.R. §73.3555(a)(1). The Commission expressed its belief "that the use of this station counting method will address our core concerns of competition and diversity." 7 FCC Rcd at 6395. As the Commission later explained, "[T]he contour overlap standard addresses our core concerns of diversity and competition while reflecting the *actual* options available to listeners and market conditions facing the particular stations in question." *Patteson Brothers, Inc.*, 8 FCC Rcd 7595, 7596 (1993) (emphasis added).

Those same "core concerns" led the Commission to exclude from the market noncommercial stations and those stations that were not operational. The Commission reasoned that "these stations do not compete for commercial advertising and are generally not included in reported ratings surveys." *Revision of Radio Rules and Policies*, 7 FCC Rcd at 6395. See *Lee W. Schubert*, 10 FCC Rcd 3159, 3160 (MMB 1995) (noncommercial stations excluded from market because they do not compete for advertising dollars).

In response to changes wrought by the Telecommunications Act of 1996,<sup>3</sup> the Commission substantially expanded the number of radio stations that a single party could own and operate in a single market. However, the Commission left unchanged its rules concerning the definition of a particular "market" and the radio stations to be included in any such market. See *Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996*, 11 FCC Rcd 12368, 12370 (1996).

The Commission's adoption of the more liberal ownership limits mandated by the Telecommunications Act of 1996 did not foreclose continued Commission consideration of how any proposed transaction might affect diversity and competition in a particular market. See *Merger NPRM* at ¶ 17. Stated another way, mechanical compliance with the new ownership limits did not and does not preclude the Commission from deciding that a particular transaction – although in compliance with the numerical limits established by statute – would nonetheless be inimical to the public interest and unworthy of a grant. On that basis, the Commission began "flagging" certain transactions in 1998 that would result in excessive concentration of radio advertising revenue in a particular market. See *Merger NPRM* at ¶ 18. And, in November 2001, the Commission initiated a rulemaking proceeding to explore the nature and kind of analysis it should pursue in deciding whether a particular radio transaction should be granted despite its

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<sup>3</sup> Pub. Law No. 104-104, 110 Stat. 56 (1996).

compliance with the local ownership limits established through the use of the contour overlap methodology. *See Merger NPRM* at ¶¶ 68-76.

## **2. Seawater Contour Overlaps Should Be Disregarded**

The same extrinsic factors which justify a denial of an otherwise compliant transaction because of undue economic concentration also require the Commission to disregard the overlap of principal community contours which occurs only as a result of the unique conductivity characteristics of seawater. In both cases, the decision should be driven by the "actual" impact of the market definition on the core concepts of competition and diversity. *Patteson Brothers, Inc.*, 8 FCC Rcd at 7596.

In virtually every situation involving both radio and television stations, the Commission has concluded that it will not consider interference between stations which incurs entirely or almost entirely over seawater.<sup>4</sup> The policy is reflected in both rules<sup>5</sup> and in decisions.<sup>6</sup> As the Commission explained:

We have allowed interference to occur over bodies of water in the past on the basis that very few listeners, if any, would be affected. Few of these

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<sup>4</sup> The Commission has similarly disregarded interference over seawater in the processing of ITFS applications that might otherwise be mutually exclusive. *See Amendment of Part 74 of the Commission's Rules*, 10 FCC Rcd 2907, 2916 (1995) ("if an applicant shows that interference will occur solely over water, we will not consider the applications to be mutually exclusive").

<sup>5</sup> 47 C.F.R. §73.37 Note 2 (provisions "concerning prohibited overlap . . . will not apply where . . . [t]he area of overlap lies entirely over sea water").

<sup>6</sup> *Generation II Radio San Diego, Inc.*, 62 FCC2d 691 (1976) (contour overlap which occurs "primarily over Pacific Coastal waters" would be disregarded); *Collier Broadcasting Co.*, 25 FCC2d 867, 868 (1970) (contour overlap that exists "entirely over saltwater except for the small island of Dry Tortugas" would be disregarded); *Larson-Irwin Enterprises (KOAG)*, 6 FCC2d 613 (1967) (contour overlap generated by "the high conductivity of long saltwater paths" would be disregarded where population in overlap area is "small"); *The Tidewater Broadcasting Co., Inc.*, 2 FCC 2d 364, 365 (1966) (subsequent history omitted)(contour overlap that "will occur mainly over a large body of water and adjacent, uninhabited marsh lands" would be disregarded).

cases, however, are to be found in the law digest, since our processing staff, acting under our instructions, have routinely ignored interference over water and proposals involving this type of interference have been granted by delegated authority.

*State University of New York*, 56 FCC2d 433, 434 (1975).

The Commission's practical disregard of interference over seawater has also been invoked when the failure to do so would deprive the public of the benefit of the multiple ownership rules. *Allan B. Mendelsohn*, 11 FCC Rcd 20499 (MMB 1996). In that case, a party with a television station in Atlantic City, New Jersey proposed to acquire an AM station that was also licensed to Atlantic City. The multiple ownership rules at the time required a waiver of the one-to-a-market rule if the Grade A signal of a television station would "entirely encompass" the community of license of the radio station to be acquired. The applicant argued that no waiver was needed because its television station did not entirely encompass Atlantic City. The Commission rejected that argument because of its policy with regard to over-water overlaps:

[T]he only portion of Atlantic City's corporate boundaries not covered by [the station's] Grade A contour is a very small area consisting of water and an uninhabited wildlife preserve. Because the entire listening population of Atlantic City is encompassed by [the television station's] Grade A contour, we believe the application of our case-by-case waiver criteria is appropriate in this instance.

11 FCC Rcd at 20500 n.6.

The same logic requires the Commission to disregard over-water overlaps in determining the number of radio stations in a particular market for purposes of applying the multiple ownership rules. It is patently unreasonable to include a station in a market when that station does not, from any practical perspective, enhance listeners' program diversity or compete for radio advertising revenue with other stations in that market. Indeed, to credit contour overlaps created by seawater in applying the local radio ownership rules would be to ignore the very reasons for the Commission's adoption of the contour methodology. *See Patteson Brothers, Inc.*, 8 FCC Rcd at 7596 (contour overlap methodology selected because it would reflect "actual" contribution of stations to program diversity and economic competition in a particular market).

Although the Commission has never addressed the issue, its staff has. *Liability of Macau Traders, Inc.*, 13 FCC Rcd 228 (MMB 1998). In that case, the Mass Media Bureau (the “Bureau”) imposed a forfeiture on a party who had an impermissible interest in a third FM radio station within the same Caribbean radio market (based upon the applicable rules at the time). The Bureau rejected the party’s argument that it believed the third station to be in a different market because “the prohibited overlap occurred over water . . . .” 13 FCC Rcd at 229. The Bureau’s rationale was set forth in a single sentence which provided no analysis: “Local radio markets which overlap only over water are not excluded from the [multiple ownership] rule.” 13 FCC Rcd at 232 (citation omitted).

The Bureau’s decision in *Macau* suffers from two basic flaws. First, the staff decision wrongly assumed that no consideration could be given to any factor that was not expressly set forth in the multiple ownership rules; however, as the Commission has explained time and again, other factors – such as excessive concentration of radio advertising revenue – can be and are considered in determining whether an application should be granted notwithstanding its mechanical compliance with the contour methodology contained in the radio ownership rules. Second, the Bureau decision in *Macau* did not make any effort to reconcile its conclusion with the practical goal to be served by the contour overlap methodology: an identification of those radio stations that actually contribute to program diversity and economic competition in a particular market. It obviously makes no sense to use that methodology to include stations in a market which make no contribution on either front.

### **3. WCSO Application Exemplifies Problem with Seawater Overlaps**

The WCSO Application exemplifies the absurdity of using contour overlaps over seawater in identifying the stations in a particular market. The Application complies with the local radio ownership rule only if it can be demonstrated that there are at least fifteen (15) commercial radio stations operating in the WCSO Market. *See* 47 C.F.R. §73.3555(a)(1)(iii).

AAA proposes to own four (4) FM radio stations in that Market, but there are only thirteen (13) radio stations in Eastern Long Island that are part of the Market. The only way to reach the threshold of fifteen (15) radio stations is to include stations from Connecticut, Massachusetts, and Rhode Island. No reasonable regulation, however, could justify including those stations.

To begin with, as explained above, WMKI(AM) was improperly included in the WCSO Market due to an error in the Commission's database with respect to the station's site coordinates. That leaves the six (6) other radio stations in Connecticut and Rhode Island. None of those stations is included in the description of the Eastern Long Island radio market by any industry publication. Annexed hereto as Exhibits 4, 5, 6 and 7 are the identification of the relevant markets in Long Island by Arbitron, BIA, the M Street Radio Directory, and Radio Business Reports. None of those trade publications includes any of the six Connecticut and Rhode Island stations in the WCSO Market.

The absence of those out-of-state stations is hardly surprising. Based on information available to Jarad, none of those six radio stations maintains a studio or sales office in Long Island. *See* Declaration of John W. Caracciolo, annexed hereto as Exhibit 8. In short, none of those six radio stations provides any programming responsive to the needs and interests of the Eastern Long Island residents or competes for radio advertising dollars in Long Island. In no sense, then, can it be said that any of those six radio stations contributes to program diversity or economic competition in the WCSO Market. To say, then, as the Application does, that the presence of those stations' signals at the edge of the north shore of Long Island is sufficient to include them in the WCSO Market is to disregard the very reasons for the Commission's adoption of the contour overlap methodology in the first place.

The logic of that conclusion is reinforced by the Commission's policy of granting two otherwise mutually exclusive radio applications because their contour overlap occurs entirely or almost entirely over seawater. As the Commission has explained, that result is justified because

there are few, if any, listeners who would be affected by the contour overlap. If two otherwise mutually exclusive applications can be granted because their contours overlap over seawater, there is no basis to say that those two radio stations should nonetheless be considered as being in the same market in determining an applicant's compliance with the local radio ownership rules.

#### **4. WXXP Should Be Excluded from Market**

WXXP is included in the Application's definition of the WCSO Market because WXXP's principal community contour overlaps with the principal community contours of one or more of the Stations to be commonly-owned by AAA. However, as explained above, WXXP plans to relocate its transmitter to a new site that will eliminate the contour overlap. It would therefore be inappropriate to include WXXP as part of the WCSO Market in determining AAA's compliance with the numerical limits established by the radio ownership rules. Exclusion of WXXP reduces to twelve (12) the number of stations actually competing and providing programming in the WCSO Market.

#### **B. If Not Denied, Application Should be Deferred**

When it initiated a rulemaking to reconsider the definition of radio markets, the Commission stated that it would defer the processing of applications that raise "concerns about how we count the number of stations a party owns in a market." *Definition of Radio Markets*, 15 FCC Rcd at 25082. That policy, in turn, was based on the Commission's decision in *Pine Bluff Radio, Inc.*, 14 FCC Rcd 6594 (1999) ("*Pine Bluff*"). As the Commission explained in the rulemaking notice, *Pine Bluff* involved a situation where a party (Seark Radio, Inc., or "Seark") proposed to own or acquire two (2) stations in a market comprised of four (4) stations. Owning two stations in the market was permissible, but Seark also owned one of the other two stations that was counted in the market. However, the contour of that third station did not overlap the common overlap areas of the first two stations and, for that reason, was not included in the



number of stations Seark owned in the relevant “market.” Although the Commission affirmed the staff’s decision on review, it decided that applications presenting similar situations should not be granted until the Commission made a final determination concerning how radio markets should be defined.<sup>7</sup>

The Application presents a situation identical to the one which confronted the Commission in *Pine Bluff*. In the instant situation, as in *Pine Bluff*, the buyer (in this case AAA) would own one additional station in the WCSO Market which, under the Commission’s current market definition methodology, is not counted as one of AAA’s commonly-owned stations in that market. If that additional station (WMOS) were added to the numerator of the calculation, AAA would own five (5) FM radio stations in the WCSO market – a situation that would clearly be impermissible in a market with only twenty radio stations. Deferral is therefore warranted.<sup>8</sup>

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<sup>7</sup> The Commission did not explicitly explain how it would identify those applications raising the same concerns as those presented by the *Pine Bluff* case. The Commission could exclude the assignee’s or transferee’s commonly-owned station from the number of stations in the identified market or it could add the assignee’s or transferee’s out-of-market commonly-owned station to the number of stations to be owned in the market. The latter method constitutes a more practical means of identifying the number of stations an individual party would own in a particular market. The Commission rules already recognize that a station whose principal community contours overlaps with one of the commonly-owned stations is part of the market and thus contributes to program diversity and economic competition. Given that recognized reality, it makes no sense to exclude the commonly-owned station from the “denominator” and thus ignore the presence of that commonly-owned station in the market.

<sup>8</sup> In light of the obstacles to a grant of the Application, AAA Entertainment LLC (or its assignee) should likewise be prohibited from implementing the TBA it previously entered into to provide programming for WCSO. If it cannot acquire the CP, AAA Entertainment LLC (and its assignee) should be similarly prohibited from having an attributable interest through that TBA. Accordingly, Jarad is filing a separate motion to enjoin TBBC and AAA Entertainment LLC from implementing the TBA.

### Conclusion

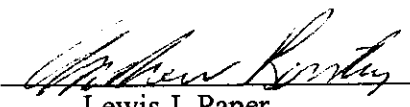
WHEREFORE, in view of the foregoing, it is respectfully requested that the Commission deny the Application or, in the alternative, defer processing of the Application until the conclusion of its rulemaking proceeding in MM Docket No. 00-244.

Respectfully submitted,

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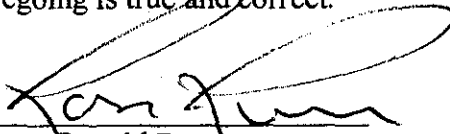

# EXHIBIT 1

## DECLARATION

Ronald Reeve hereby declares as follows:

1. I am employed by Jarad Broadcasting Company of Westhampton, Inc. ("Jarad"), licensee of WDRE(FM) in Westhampton, New York.
2. On January 3, 2002, I inspected the public inspection file for WCSO(FM) in the Chamber of Commerce office located on 76 Main Street in Southampton, New York. I reviewed the entire inspection file. It did not include any Time Brokerage Agreement.

I hereby declare under penalty of perjury that the foregoing is true and correct.

  
\_\_\_\_\_  
Ronald Reeve  
  
  
\_\_\_\_\_  
Date

# **EXHIBIT 2**

**ENGINEERING STATEMENT**  
**IN SUPPORT OF PETITION TO DENY**  
**ASSIGNMENT OF CONSTRUCTION PERMIT**  
**WCSO CHANNEL 225A SOUTHAMPTON, NEW YORK**  
**FROM**  
**PECONIC BAY BROADCASTING CORPORATION**  
**TO**  
**AAA ENTERTAINMENT LICENSING LLC**

**ENGINEERING STATEMENT  
IN SUPPORT OF PETITION TO DENY  
ASSIGNMENT OF CONSTRUCTION PERMIT  
WCSO CHANNEL 225A SOUTHAMPTON, NEW YORK  
FROM  
PECONIC BAY BROADCASTING CORPORATION  
TO  
AAA ENTERTAINMENT LICENSING LLC**

This engineering statement has been prepared on behalf of Jarad Broadcasting Company of Westhampton, Inc. ("Jarad"), licensee of FM station WDRE, Channel 253A, Westhampton, New York, and in support of Jarad's Petition to Deny the application (the "Application") proposing the assignment of the Construction Permit (the "CP") for WCSO(FM), Channel 225A, Southampton, New York, from Peconic Bay Broadcasting Corporation to AAA Entertainment Licensing LLC ("AAA"). The purpose of this statement is to ascertain whether AAA's acquisition of the CP for WCSO is consistent with the FCC's multiple ownership rules and policies.

**SUMMARY**

The Application's engineering statement, Exhibit 15, discloses that, upon consummation of its acquisition of the WCSO CP, AAA would own four FM stations which it describes as being located in one market (the "Market"). The stations in the Market are as follows:

WCSO	Channel 225A	Southampton, NY
WBAZ	Channel 273A	Bridgehampton, NY
WBEA	Channel 269A	Southold, NY
WEHM	Channel 244A	Southampton, NY

The Application states that common ownership of the four (4) FM stations is permitted under Commission rules because there are twenty (20) commercial radio stations in the Market.

The Application acknowledges that one of those twenty (20) stations is WMOS(FM), Channel 284A, Montauk, New York, which is also owned by AAA. However, the Application states that WMOS is not considered to be in the Market because WMOS's principal community contour only overlaps the principal community contour of WBEA and does not overlap the principal community contours of WCSO, WBAZ or WEHM. In other words, AAA acknowledges that it will own five (5) FM radio stations whose contours overlap the contours of one or more of the other commonly-owned radio stations in the Market.

Contrary to the claims in the Application, there are less than fifteen (15) commercial radio stations in the Market. Consequently, AAA's ownership of four (4) FM radio stations in the Market would violate Section 73.3555(a)(1)(iii) of the Commission's rules if the Market is as described by the Application.

Even if AAA's acquisition of the CP would satisfy the literal language of the Commission's multiple ownership rules, deferral of the processing of the Application would nonetheless be warranted in accordance with Paragraph 14 of the Commission's Notice of Proposed Rule Making in MM Docket No. 00-244, *Definition of Radio Markets*, 15 FCC Rcd 25077, 25082 (2000). In that paragraph, the FCC stated that it would defer the processing of applications when, as here, there are additional commonly-owned stations (in this case WMSO) that are not one of the commonly-owned stations in the "market" as defined by the rules but are included as one of the stations whose signal overlaps with one of the other commonly-owned stations in the market.

### **MARKET IDENTIFICATION**

Upon consummation of its acquisition of the CP, AAA would own and operate five (5) FM radio stations in Eastern Long Island. According to the Application, these five (5) stations constitute two separate "markets" under the FCC's multiple ownership rules. 47 C.F.R. §73.3555(a)(3)(ii). The grouping of the markets is premised on the common overlap areas of the stations' principal



community contours. The Application groups the stations in the following two different markets:

Market

1	WCSO	CH 225A	Southampton, NY
1	WBAZ	CH 273A	Bridgehampton, NY
1 & 2	WBEA	CH 269A	Southold, NY
1	WEHM	CH 244A	Southampton, NY
2	WMOS	CH 284A	Montauk, NY

### **CONTOUR LOCATIONS AND METHODOLOGY**

Annexed hereto as Figure 1 is a depiction of the principal community contours of the stations identified by the Application as being in the Market. Figures 2 - 8 depict the principal community contours of AM stations which the Application states should be included in the Market total.

The technical facilities for all FM stations were taken from the FCC's computer database. The radiation center AMSL, ERP and transmitter site coordinates were used with terrain data at 5 degree intervals, 72 evenly spaced radials, from the FCC 30 second terrain database to determine contour locations. Each 70 dBu contour location was determined by use of a computer program of known accuracy and repeatability using Figure 1 in Section 73.333 of the Commission's rules.

The technical facilities for all AM stations were taken from the FCC computer database. The technical facilities for each station were used to determine inverse field at one kilometer. The notified radiation efficiency was used for non-directional stations.

Radiation was computed in accordance with Sections 73.150 and 73.152 of the Commission's rules for directional antennas. Distance to the 5 mV/m contour was determined in accordance with the methodology described in Section 73.183 of the rules. Figure M3 soil conductivity data was used for all computations with radials evenly spaced at 1 degree intervals.

Figure 1 annexed hereto is a map which shows the principal community contours for the five (5) FM stations that AAA will own after its acquisition of the WCSO CP. The Application defines the Market for purposes of the multiple ownership analysis as the composite perimeter of the 70 dBu principal community contours for the WCSO CP as modified, WBAZ, WBEA and WEHM. The Application excludes WMOS from the Market because its principal community contour does not overlap the principal community contours of all of the other commonly-owned stations. WMOS's principal community contour does, however, overlap the principal community contour of WBEA.

#### OTHER STATIONS IN THE MARKET

The Application states that the Market includes seven other commercial FM stations (including WMOS) and nine commercial AM stations whose principal community contours overlap the principal community contour of at least one of the commonly-owned stations in the Market, thus bringing the total number of commercial radio stations in the Market to twenty.

The AM stations included in the Market consist of the following:

<u>Call</u>	<u>Frequency</u>	<u>City</u>	<u>State</u>	<u>Distance (Miles) From WCSO Transmitter Site</u>
WADS	690 kHz	Ansonia	CT	47.7
WSUB	980 kHz	Groton	CT	32.1
WXNI	1230 kHz	Westerly	RI	38.2
WLIS	1420 kHz	Old Baybrook	CT	24.8
WMKI	1260 kHz	Boston	MA	112.6
WRIV	1390 kHz	Riverhead	NY	16.7
WFIF	1500 kHz	Milford	CT	42.3
WDJZ	1530 kHz	Bridgeport	CT	49.5
WFTU	1570 kHz	Riverhead	NY	16.5

WMKI should be excluded from the market. The FCC database incorrectly shows the latitude of the WMKI daytime site as 41°, which is in the Atlantic Ocean. The Application used that incorrect coordinate in determining that the principal community contour of WMKI overlapped with one of the commonly-owned stations in the Market. The correct coordinates for the WMKI daytime facility are the same as the WMKI nighttime site, which is correctly identified in the FCC database. Figure 5 annexed hereto depicts the correct WMKI 5 mV/m contour. It shows that there is no 5 mV/m overlap with the principal community contours of any of the stations in the Market.

Six of the remaining seven AM stations are located outside New York (in Connecticut and Rhode Island) and have 5 mV/m contours that reach the edge of the northern shore of Long Island on a theoretical basis only because of the unique conductivity of signals over salt water paths. In each case, the over-salt-water path causes the 5 mV/m contour of the particular AM station to reach Long Island and then, in four of the six cases (WADS, WSUB, WFIF, and WXNI), abruptly terminate upon hitting land. The contours of the other two AM stations (WLIS and WDJZ) penetrate a little further but still should not be included in the Market since their signals would not reach Long Island at all if it were not for the unique over salt water path. In any case, signal strength from all six of the AM stations drops immediately at the point where the transmission path transitions from salt water to land.

The de minimis nature of the overlap by the Connecticut and Rhode Island AM stations is reflected in Figures 2 - 8 annexed hereto. The 5 mV/m contours of the six AM stations are depicted in light blue. The Long Island shore is shown in black.

The FCC has consistently held that there is no prohibited overlap of radio contours if all or virtually all of the overlap occurs over sea water. See 47 C.F.F. 73.37 NOTE 2; *The Tidewater Broadcasting Co., Inc.*, 2 FCC2d 364 (1966). The same analysis would preclude including six of the AM radio stations (WADS, WSUB, WXNI, WLIS, WFIF and WDJZ) in the Market.

It would also be inappropriate to include WXXP(FM) in the market. On January 16, 2002, the Commission granted a construction permit to WXXP(FM) to relocate its transmitter site, File No.BPH-20011012AAW. Figure 9, attached hereto, depicts the WXXP CP 70 dBu in relation to the four FM stations which make up the Market as described in the Application. There is no overlap of the WXXP 70 dBu contour with the 70 dBu contours of any of the four stations described by the Application as making up the Market. WXXP should, therefore, be excluded from the Market.

If the foregoing adjustments are made, there are no more than twelve (12) commercial radio stations in the Market.

#### **DEFERRAL REQUIRED IN ANY EVENT**

As reflected in all the Figures annexed hereto, WMOS places a principal community contour over two of the radio stations in the Market. However, WMOS is excluded from the Application's definition of the Market because its contour does not overlap the common area created by the other four (4) stations commonly-owned or to be owned by AAA in the Market. The principal community contour of WMOS is approximately 0.37 miles from the common overlap area with WCSO, WEHM and WBEA and approximately 4.2 miles from the common overlap area that defines the Market. If WMOS were included, AAA would own five (5) FM radio stations in the Market. Under Section 73.3555(a)(1) of the rules, a single entity can only own five (5) FM radio stations in the market if there are 45 or more commercial radio stations in the market. The Market identified in the Application has less than 50% of that number of commercial radio stations. Deferral of the processing of the Application is therefore warranted under Paragraph 14 of the Commission's Notice of Proposed Rule Making in MM Docket No. 00-244, *Definition of Radio Markets*, 15 FCC Rcd 25077, 25082 (2000). Although the Commission's order in that docket did not explicitly explain whether it was concerned with the "numerator" or "denominator" of market calculations, the location of the WMOS principal community contour shows that, for all practical purposes, WMOS is part of the Market as defined by the Application.

## CONCLUSION

Based on the data submitted herein, the proposed assignment of the WCSO CP to AAA would violate Section 73.3555(a)(1)(iii) because AAA proposes to own four (4) commercial FM radio stations in a market with no more than twelve (12) commercial radio stations.

The only commercial radio stations that can be deemed to be in the Market are as follows:

### AAA Stations

	<u>Call Sign</u>	<u>Channel</u>	<u>City</u>	<u>State</u>
1	WCSO	225A	Southampton	NY
2	WBAZ	273A	Bridgehampton	NY
3	WBEA	269A	Southold	NY
4	WEHM	244A	East Hampton	NY
5	WMOS	284A	Montauk	NY

### Other FM Stations

	<u>Call Sign</u>	<u>Channel</u>	<u>City</u>	<u>State</u>
6	WDRE	253A	Westhampton	NY
7	WHFM	237A	Southampton	NY
8	WLNG	221A	Sag Harbor	NY
9	WVLG	241A	Center Moriches	NY
10	WWXY	296A	Hampton Bays	NY

### AM Stations

	<u>Call Sign</u>	<u>Frequency</u>	<u>City</u>	<u>State</u>
11	WRIV	1390 kHz	Riverhead	NY
12	WFTU	1570 kHz	Riverhead	NY

**CERTIFICATION**

The foregoing was prepared on behalf of Jarad Broadcasting Company of Westhampton, Inc. by Clarence M. Beverage of Communications Technologies, Inc., Marlton, New Jersey, whose qualifications are a matter of record with the Commission. The statements herein are true and correct of his own knowledge, except such statements made on information and belief, and as to these statements he believes them to be true and correct.

By 

**Clarence M. Beverage**  
for Communications Technologies, Inc.  
Marlton, New Jersey

**SUBSCRIBED AND SWORN TO** before me,

this 25th day of January, 2002,

Esther G. Sperbeck, NOTARY PUBLIC

**ESTHER G. SPERBECK**  
**NOTARY PUBLIC OF NEW JERSEY**  
**MY COMMISSION EXPIRES OCT. 15, 2002**

This map illustrates the Long Island Sound region, including parts of New York and Connecticut. It features a grid of latitude and longitude coordinates. Overlaid on the map are five large circles representing the coverage areas of radio stations: WBAZ (Bridgehampton), WBEA (Sag Harbor), WCSO (Westhampton), WEHM (Farmingville), and WMOS (Montauk). The map is densely populated with place names, such as Nut Plains, Guilford, Madison, Clinton, Westbrook, Old Saybrook, South Lyme, Niantic, Groton, Long Point, Pleasure Beach, Fishers Island, Town Landing, Old Lyme, Sound View, Black Point, Fenwick, Fernwood, Ridgewood, Kelseytown, Guilford, Zetes Island, 41-5, 41-00, 40-45, 72-30, 72-20, 72-00, Orient Point, Spring East Marion, Greenport, Shelter Island, Shelter Island, Peconic, Montauk Colony, Fire Island, Greplace Lodge, Lafarres Landing, Kingstown, Springs, Napeague, Montauk, Ditch Plains, WBAZ, WBEA, WCSO, WEHM, WMOS, Cutchogue Station, East Cutchogue, North Haven, Sag Harbor, Freetown, Farmingville, Jericho, Bridgehampton, West Mecox Village, Cobb, Hampton Park, North Sea, Deerfield, Rose Grove, New Suffolk, Cutchogue, Malibu, Luce Landing, Northville, Aqueduct, Jamesport, Southport, Squiretown, Southhampton, Hampton Bay, Nana, Oakville, Sweeney, Riverhead, Speonk, Westhampton, Remsenburg, Westhampton Beach, and East Quogue.

 State Borders
  Lat/Lon Grid

FIGURE 1

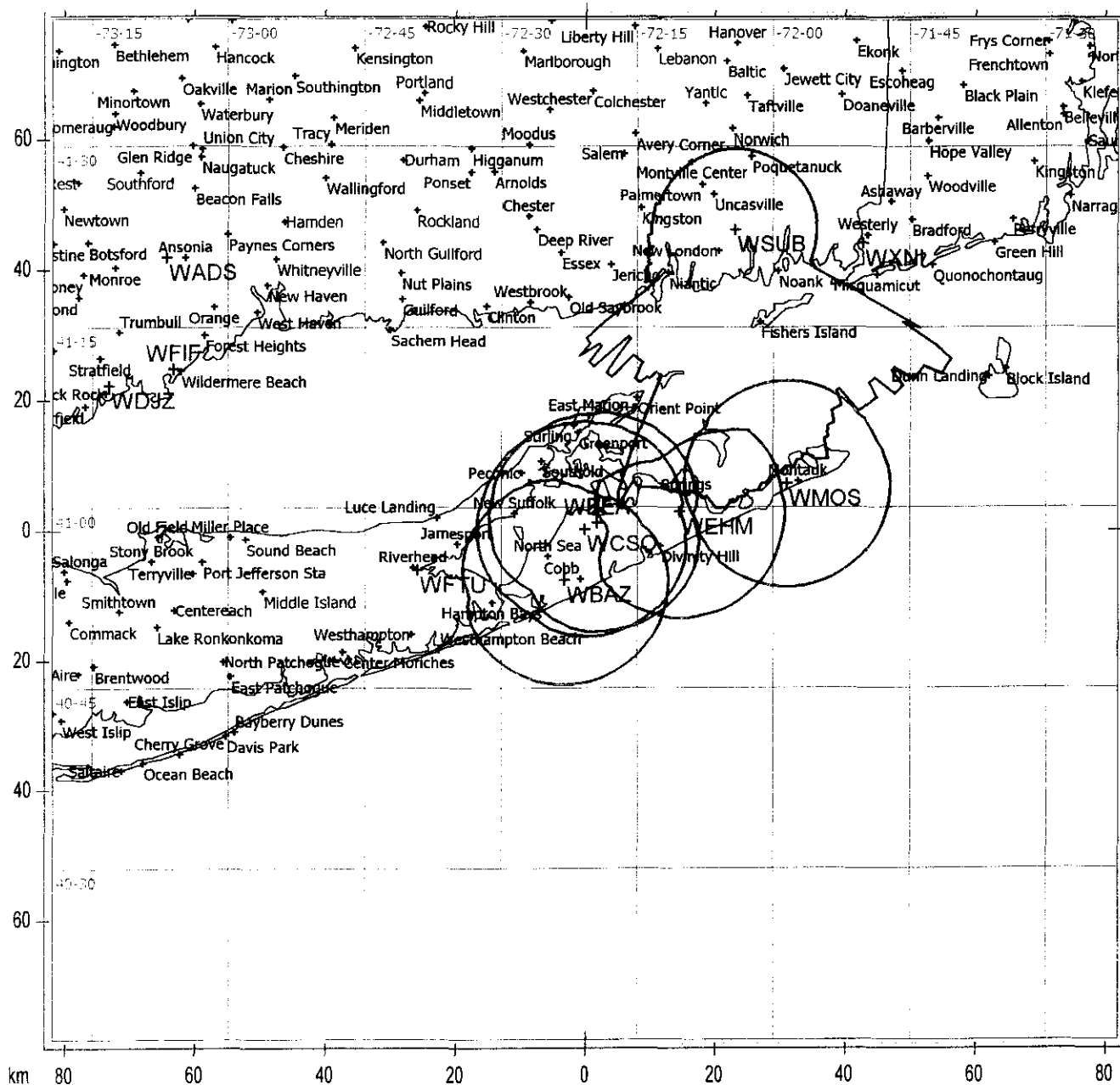
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 State Borders
  Lat/Lon Grid

FIGURE 2



## WSUB 980 kHz GROTON, CONNECTICUT 5 mV/m



Communications Technologies, Inc. Marlton, New Jersey

State Borders      Lat/Lon Grid

Map Scale: 1:983722    1 cm = 9.84 km    V/H Size: 156.65 x 163.73 km

FIGURE 3

This map illustrates the geographical distribution of radio stations in the New England area, specifically focusing on the states of Massachusetts, Connecticut, and Rhode Island. The map features a grid of latitude and longitude lines, with latitude ranging from 40°N to 45°N and longitude from 70°W to 74°W. A scale bar at the bottom indicates distances in kilometers, ranging from 0 to 80 km.

Key locations and radio stations marked on the map include:

- Massachusetts:** Boston (WGBL, WGBX, WGBH, WGBZ, WGBZ-FM, WGBZ-TV, WGBZ-DT, WGBZ-DT2, WGBZ-DT3, WGBZ-DT4, WGBZ-DT5, WGBZ-DT6, WGBZ-DT7, WGBZ-DT8, WGBZ-DT9, WGBZ-DT10, WGBZ-DT11, WGBZ-DT12, WGBZ-DT13, WGBZ-DT14, WGBZ-DT15, WGBZ-DT16, WGBZ-DT17, WGBZ-DT18, WGBZ-DT19, WGBZ-DT20, WGBZ-DT21, WGBZ-DT22, WGBZ-DT23, WGBZ-DT24, WGBZ-DT25, WGBZ-DT26, WGBZ-DT27, WGBZ-DT28, WGBZ-DT29, WGBZ-DT30, WGBZ-DT31, WGBZ-DT32, WGBZ-DT33, WGBZ-DT34, WGBZ-DT35, WGBZ-DT36, WGBZ-DT37, WGBZ-DT38, WGBZ-DT39, WGBZ-DT40, WGBZ-DT41, WGBZ-DT42, WGBZ-DT43, WGBZ-DT44, WGBZ-DT45, WGBZ-DT46, WGBZ-DT47, WGBZ-DT48, WGBZ-DT49, WGBZ-DT50, WGBZ-DT51, WGBZ-DT52, WGBZ-DT53, WGBZ-DT54, WGBZ-DT55, WGBZ-DT56, WGBZ-DT57, WGBZ-DT58, WGBZ-DT59, WGBZ-DT60, WGBZ-DT61, WGBZ-DT62, WGBZ-DT63, WGBZ-DT64, WGBZ-DT65, WGBZ-DT66, WGBZ-DT67, WGBZ-DT68, WGBZ-DT69, WGBZ-DT70, WGBZ-DT71, WGBZ-DT72, WGBZ-DT73, WGBZ-DT74, WGBZ-DT75, WGBZ-DT76, WGBZ-DT77, WGBZ-DT78, WGBZ-DT79, WGBZ-DT80, WGBZ-DT81, WGBZ-DT82, WGBZ-DT83, WGBZ-DT84, WGBZ-DT85, 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